D.P.U. 90-98

Petition of 44 customers in Wellesley requesting an investigation by the Department of Public Utilities upon their complaint regarding the price of electricity sold by the Wellesley Municipal Light Department.

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*PRO SE*
*Petitioners*

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FOR: WELLESLEY MUNICIPAL LIGHT PLANT
*Respondent*

## I. INTRODUCTION

On April 23, 1990, a group of 44 residential customers ("Petitioners") of the Wellesley Municipal Light Plant ("WMLP" or "Respondent") filed with the Department of Public Utilities ("Department") a request for investigation by the Department of their complaint regarding the rates of WMLP[1]. The Petitioners allege generally that several of Wellesley's rates then in effect were in violation of the provisions of G.L. c. 164, §§ 57 and 58.[2] The petition was docketed as D.P.U. 90-98.

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[1] The sponsor of the petition was John J. Prybyla.

[2] Section 58 states inter alia:

> No price in said schedules shall, without the written consent of the department, be fixed at less than production cost as it may be defined from time to time by order of the department. Such schedules of prices shall be fixed to yield not more than eight per cent per annum on the cost of the plant, as it may be determined from time to time by order of the department, after the payment of all operating expenses, interest on the outstanding debt, the requirements of the serial debt or sinking fund established to meet said debt, and also depreciation of the plant reckoned as provided in section fifty-seven, and losses; but any losses exceeding three per cent of the investment in the plant may be charged in succeeding years at not more than three percent per annum.

Section 57 states that a municipal light plant should include:

> an amount for depreciation equal to three per cent of the cost of the plant exclusive of land and any water power appurtenant thereto, or such smaller or larger amount as the

(continued...)

On June 8, 1990, WMLP filed an Answer denying the allegations, and a Motion to Dismiss ("Motion") the complaint for failure to state a claim upon which relief could be granted.[3] On June 18, 1990, the Petitioners filed a Reply to WMLP's Motion.

On January 1, 1993, WMLP adopted new rate schedules that superseded most of the rates in effect at the time of the petition, including the rates that are the subject of the instant petition.

## II. POSITIONS OF THE PARTIES

### A. Petitioners

The Petitioners allege that (1) WMLP's Purchased Power Adjustment Charge ("PPAC") (M.D.P.U. No. 88-8A), adopted on December 1, 1989, discriminates against residential[4] and General Rate Schedule A customers; (2) WMLP's General Demand Rate Schedule B (M.D.P.U. No. 88-4) and the Primary Rate (M.D.P.U. No. 88-6) violate G.L. c. 164, § 58 by being set at less than

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[2](...continued)

> department may approve .... By cost of the plant is intended the total amount expended on the plant to the beginning of the fiscal year for the purpose of establishing, purchasing, extending or enlarging the same.

[3] Along with its pleadings, WMLP also provided a copy of its Purchased Power Adjustment Charge ("PPAC") schedule, a Cost of Service Study ("COSS"), and a technical analysis of WMLP's rates prepared by LaCapra Associates.

[4] Although the petition does not explicitly say so, we interpret the term "residential" to mean those customers taking service under the Company's Residential Rate (M.D.P.U. No. 88-1) and Residential Demand Rate (M.D.P.U. No. 88-2).

production cost; and (3) WMLP's 1988 general rate increase[5] did not produce the revenue increase that WMLP had expected, and as a result, on December 1, 1989, WMLP raised its PPAC (M.D.P.U. No. 88-8A) for all customers by $0.06 per kilowatt-hour ("kwh") to make up for the alleged revenue shortfall (Petition at 1-4; Reply at 1-4).[6] The Petitioners seek an investigation by the Department into these allegation and request an evidentiary hearing to prove their allegations (Reply at 1-4). With regard to relief, the Petitioners request that the Department require WMLP to (1) adjust the PPAC to make it non-discriminatory; and (2) to file new General-B and Primary rates, for retroactive effect as of June 1, 1988, that would be set at production cost, and to retroactively bill the General-B and Primary Rate

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[5] On June 1, 1988, WMLP adopted the following new rate schedules: M.D.P.U. Nos. 88-1, 88-2, 88-3, 88-4, 88-5, 88-6, 88-7, 88-8, and 88-9.

[6] The PPAC "cover[s] the cost of wholesale power supply, including generation and transmission capacity and fuel, [and is] applied to all kilowatthours billed in addition to other charges." M.D.P.U. No. 88-8A. General Rate Schedule A customers are "those permanent and temporary customers who have and maintain a demand of less than 5 KW in any month for lighting, heating and other general purposes including multiple dwelling complexes served by one meter, for which service is not available under the Residential or Primary Service Rate Schedules." M.D.P.U. No. 88-3. General-B service "is available to those permanent and temporary customers who have or will achieve a demand of 5 KW or greater in any month for lighting, heating and other general purposes including multiple dwelling complexes served by one meter." M.D.P.U. No. 88-4. "Service under [the Primary Rate] is available ... to customers who take service at primary voltage and who maintain a minimum demand of 250 KWs." M.D.P.U. No. 88-6.

customers to recover $801,000 in revenues that the Petitioners claim was "lost" in fiscal year 1989 because the rates were "illegally" set below cost (Petition at 2-3; Reply at 1-4).

B. Respondent

In its Answer, WMLP (1) denies that its PPAC is unlawfully discriminatory and claims that its tariff applies a uniform rate per kwh for all metered rate classes; (2) denies that its General-B and Primary rates are set below production cost and argues that these rates are based on a Cost of Service Study ("COSS") that shows these rates are not set below production cost; (3) denies that there is any legal impropriety in the establishment of its rates in effect as of June 1988, or in effect as of December 1, 1989; and (4) contends that the Department does not have the authority to make the rate adjustments and impose the ratemaking supervision that the Petitioners seek (Answer at 1-2).

WMLP's Motion asserts generally that the petition should be dismissed for failure to state a claim upon which relief could be granted (Motion at 1-5). In addition, WMLP contends that there are no grounds upon which the Department should investigate the Petitioners' allegations and that the Petitioners are not entitled to a hearing to prove their claims (Id.).

be discriminatory since the Petitioner does not demonstrate that it differs among rate classes (Id. at 1-2; citing Board v. Water Commissioners of Billerica, 242 Mass. 223 (1922)).

In response to the allegation that the General-B and Primary rates are unlawfully set below production cost, WMLP argues that this contention is not supported by any facts contained in the Petition, and that the COSS demonstrates on its face that the rates cover their production costs (Id. at 2). Furthermore, WMLP contends that these rates are being increased over time in accordance with the Department's rate continuity principles (Id. at 3).

## III. ANALYSIS AND FINDINGS

At the outset, it is necessary that we discuss our jurisdiction with respect to municipal utility ratemaking.

The Supreme Judicial Court has declared that the Department has a more limited role in supervising municipal utilities as compared to its supervisory authority over nonmunicipal (i.e., investor-owned) utilities. See Board of Gas & Elec. Comm'n of Middleborough v. Department of Pub. Utils., 363 Mass. 433, 438 (1973) (held that for municipal light boards there is "a legislative deference to the fact that their rate schedules are fixed by 'public officers acting under legislative mandate' and that therefore they do not require the close scrutiny and measure of supervision by the Department which is authorized or required as to nonmunicipal electric companies under § 94" (quoting Adie

v. Mayor of Holyoke, 303 Mass. 295, 300 (1939)). See also City of Holyoke Gas and Electric Department, D.P.U. 90-279, at 4-5 (1990) (Department noted that it "has traditionally found that its jurisdiction over the practices of municipal utilities is more limited than its powers over investor-owned utilities"); and Hull Municipal Light Plant, D.P.U. 87-19-A at n.8 (1990), citing Holyoke Water Power Co. v. Holyoke, 349 Mass. 442 (1965); and Reading Municipal Light Department, D.P.U. 85-121/85-138/86-28-F at 16 (1987)(Department noted that "[u]nder the statutory scheme for municipal electric departments, the Department generally defers to the ratemaking authority and policies vested by statute in the municipality unless the rates are prohibited by statute or rise to the level of unduly discriminatory"). The Court has held that "[t]his discretion, however, is circumscribed by, among other considerations, the specific rate design restrictions in G.L. c. 164, § 58, the requirement that rates be filed with the department, G.L. c. 164, § 59, and the department's supervisory power to review such rates as set forth in G.L. c. 164." Bertone v. Department of Pub. Utils., 411 Mass. 536, 548 (1992), citing Municipal Light Comm'n of Peabody v. Peabody, 348 Mass. 266, 268-273 (1964).

While the Court has not specifically defined the bounds of the Department's jurisdiction over the rates of municipal utilities, it has held that a customer cannot compel the Department to investigate the rate structure of a municipal light

plant, unless there is an allegation of a violation of the provisions of §§ 57 and 58. See Prybyla v. Department of Pub. Utils., No. 79-188 Civ. (Supreme Judicial Court for Suffolk County, Oct. 16, 1979) ("Prybyla"). In that single-justice decision, the Court stated:

> The structure of the rates is subject to local control. If there is a gross inequity in the rate structure, it may be attacked through the processes of local government. If there is a weakness in the system, the D.P.U. is entitled to assert jurisdiction on its own motion, thus raising for judicial determination the scope of the D.P.U.'s statutory authority to regulate the rate structures of municipal light plants. If the Legislature determines that the statutory pattern fails to furnish customers of municipal light plants adequate means for challenging unfair discrimination in the rates of municipal light plants, it may determine to change the law. Indeed, if the D.P.U. thinks it should have specific statutory authority to deal with inequities in the rate structure of municipal light plants, the D.P.U. may seek legislative assistance. This case ... presents a matter which the D.P.U. was not obliged to consider on its merits.

Id. at 7-8.

In Prybyla,[7] the Court agreed with the Department's interpretation of its statutory duty under §§ 57 and 58. Id. at 6-8; see Wellesley Municipal Light Department, D.P.U. 19535, at 5 (1979) ("As long as the price in the schedules is above the production cost and earnings do not exceed 8% of the cost of the plant, the Department's jurisdiction ends. By excluding municipals from the coverage of s. 94, the Legislature expressed

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[7] The case concerned an appeal by the sponsor of the instant Petition of the Department's dismissal in D.P.U. 19535 of an earlier, similar complaint against WMLP.

an intent to leave rate structure questions to local governments.").

It is clear from the above jurisdictional analysis that the Petitioners' third allegation (i.e., that WMLP's 1988 general rate increase did not produce the revenue increase that WMLP had expected and, as a result, WMLP was forced to raise the PPAC to avoid a revenue shortfall) concerns an issue that the Department lacks jurisdiction to investigate. Even assuming the Petitioners' claim to be true, absent a § 57 or § 58 claim, or a claim of undue discrimination, the Department has no statutory authority to examine this claim. Prybyla at 7-8, supra. As the Court and the Department have stated before, the responsibility for these matters has been delegated by statute to local officials -- in this case, the Wellesley Board of Public Works. We have no oversight authority. Accordingly, the Petitioners' third allegation is dismissed for lack of jurisdiction.

The same cannot be said about the first and second allegations. The Department does have jurisdiction to investigate the Petitioners' allegations that WMLP's PPAC is discriminatory and that the General-B and Primary rates are set at less than production cost. However, for the following reasons, we find that these claims are rendered moot.

On January 1, 1993, WMLP adopted new rate schedules that cancelled most of the rates that were in effect at the time of the Petition, including the PPAC, and the General-B and Primary rates. See M.D.P.U. Nos. 92-3, 92-5 and 92-6, issued November 30, 1992 and effective January 1, 1993, cancelling inter

alia respectively M.D.P.U. Nos. 88-4, 88-6, 88-8A.

Even if the Department granted the Petitioners a hearing and found the allegations to be true, the Department would not be able to provide the Petitioners the relief they request. The Department could not change rates that are no longer in effect. Moreover, it is well established that the Department has no authority to change a rate retroactively. Metropolitan District Commission v. Department of Pub. Utils., 352 Mass. 18, 26 (1967).[9] Thus, the Department could not order WMLP to rebill customers to recover any allegedly lost revenue. Any determination on these now-cancelled rates would be in the nature of an advisory opinion[10] and would not provide the Petitioners with the relief requested. Accordingly, the Department finds that the claims of the Petitioners are moot. See Commonwealth Electric Company, D.P.U. 89-245 (1994) (Department dismissed customer petition as moot where complained-of rates were no

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[8] On July 1, 1994, WMLP revised its PPAC once again, replacing M.D.P.U. No. 92-6 with M.D.P.U. No. 94-2.

[9] In Metropolitan District Commission, the Court held that a utility customer that had been overcharged could recover the overcharge in an action against the company if the Department had made a determination that an overcharge did occur. Id. at 27-29. However, the Petitioners did not ask for that form of relief. They requested that the Department order WMLP to rebill customers so that WMLP could recover the revenues which the Petitioners claimed were lost as a result of the alleged illegally-set rates.

[10] The Department ordinarily declines to issue advisory opinions. Massachusetts-American Water Company, D.P.U. 95-41, at 7 (1995), citing Town of Stow, D.P.U. 93-124-B at 1 (1994).

longer in effect).

Because we dismiss the Petition on jurisdictional and mootness grounds, it is not necessary to consider the Respondent's Motion to Dismiss, except to the extent noted supra in which we agree with WMLP's arguments on the Department's jurisdiction. In dismissing the Petition, the Department makes no findings with respect to the substantive allegations.

## IV. ORDER

After due notice and consideration, it is

ORDERED: That the Petition of 44 customers of the Wellesley Municipal Light Plant, filed with the Department on April 23, 1990, be and hereby is DISMISSED.

By Order of the Department,

Mary Clark Webster, Commissioner

Janet Gail Besser, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).